Costs obligations when acting for multiple parties

Bechara v Legal Services Commissioner [2010] NSWCA 369

It is axiomatic that a legal practitioner may charge a client only once for any work that is done. The New South Wales Court of Appeal has confirmed that, where a practitioner acts for several clients in the same hearing, each client is not to be charged separately for the same item of work. A failure to apportion the cost of work done for all clients will constitute excessive charging and is capable of being unsatisfactory professional conduct or professional misconduct.

The facts

Ms Bechara, a solicitor, acted for three members of the same family who had suffered injuries in the same premises but on different days. Separate claims were commenced for each client against the same defendant in the District Court and it was agreed that the proceedings would be heard together, with evidence in one being evidence in the others.

At the hearing, the parties were represented by the same barrister, and a junior solicitor at Ms Bechara's firm attended each day of the hearing. Ms Bechara attended to take judgment in the matter, in which her clients were successful and obtained orders for costs in their favour.

Ms Bechara prepared three itemised bills of costs for each client and charged each separately for the time her junior solicitor spent at court and for her attendance to take judgment. The effect was that the costs for the one attendance by each practitioner were trebled. Ms Bechara received no complaint from her clients in relation to the bills of costs she issued.

Ms Bechara then prepared and served three party–party bills of costs for the same amounts as the costs charged to her clients. She engaged in negotiations for an agreed sum of party–party costs with the defendant's solicitor in which she offered to reduce her fees. Negotiations were unsuccessful and the costs were assessed by a costs assessor, who called for the solicitor/client bills. The costs assessor referred the matter to the legal services commissioner.

The commissioner initiated a complaint under the *Legal Profession Act 1987* (NSW) alleging deliberate charging of grossly excessive amounts of costs, then declared to be professional misconduct by s 208Q(2) of the Act.

Issues

The crux of the commissioner's complaint in relation to Ms Bechara's conduct was that she failed to apportion common costs across the three matters. In proceedings before the Administrative Decisions Tribunal, the commissioner alleged that this conduct was contrary to:

- the terms of her costs agreement with each client, which provided that she would charge for the work performed for that client;
- her obligation at law[1] to charge only for the work actually performed for each client; and
- her obligation at law and under the *Legal Profession Act 1987* (NSW) to charge only a fair and reasonable fee for the work.

According to the commissioner, because the time spent in court was not apportioned, each client was charged for time spent in court exclusively for another client, was charged an inflated fee for work that did not relate to all three clients, and was charged without reference to the nature of the actual work undertaken by the junior solicitor during the hearing.

Ms Bechara's evidence before the tribunal was that she did not intend to overcharge her clients. She genuinely believed that the terms of her costs agreement entitled her to charge each client separately for the costs of the hearing. She did not intend her clients to pay the amounts set out in the bills of costs she rendered, she intended to charge them according to the amount recovered as party-party costs. The full bills of costs were rendered so as to enliven the 'indemnity principle' grounding her client's entitlement to party–party costs.

The tribunal found that Ms Bechara was guilty of professional misconduct and she appealed to the Court of Appeal.[2]

Findings

McLellan CJ at CL delivered the judgment of the Court of Appeal, with which McColl and Young JJA agreed. His Honour reviewed a number of decisions relied on by Ms Bechara in support of the proposition that she was under no obligation to apportion the costs of the hearing between her clients.[3] From each of them the

judge derived the principle that in cases heard together (whether formally consolidated or otherwise) work that is required to be done once for all of the cases should be apportioned. McLellan CJ at CL stated the relevant principle at [138]:

> ...where a solicitor is retained to act for multiple clients whose proceedings are heard together with evidence in one being evidence in the other (regardless of whether the proceedings are formally consolidated), and the clients are charged on a time-costed basis, there must be an apportionment of time spent on matters common to two or more of the proceedings. One unit of time cannot be charged more than once.

The principle identified by McLellan CJ at CL is consistent with the solicitor's fiduciary duty, and in particular the duty to avoid conflicts between his or her interests and those of the client.

His Honour accepted that the precise mechanism of apportionment would vary depending on the circumstances of the case. In some cases a simple division of time between each matter may give way to an allocation of the time spent exclusively on a single matter, and an apportionment of the time spent on common issues. In the present case, his Honour found that the attendance of Ms Bechara and her junior solicitor at court would, for the most part, be instructing counsel in relation to the same evidence in each proceeding, so that the work done was common to each client. It should have been apportioned in those circumstances.

McLellan CJ at CL also upheld the tribunal's finding that a proper construction of Ms Bechara's costs agreement, which read 'we will charge you... at the following hourly rates for each hour engaged on your Work...' provided that they could be charged only for work relating to their own matter, and that it was not necessary to imply the word 'exclusively' into the agreement to achieve this.

McLellan CJ at CL also rejected Ms Bechara's argument that she never intended to charge the fees set out in the bills of costs, and instead intended to reduce her fees in accordance with her clients' recovery of party-party costs. Ms Bechara's bills of costs did not contain any indication that she did not intend to demand payment until the assessment of party-party costs was complete (they in fact stated that the fees would be charged from trust moneys if no objection was raised).

His Honour found that Ms Bechara's offer to discount her fees did not address the original mischief of triple charging for the same work, and in any event there was a likelihood that, if the full amount of each bill of costs was allowed on assessment, she intended to charge that amount.

Conclusion

The *Legal Profession Act 2004* (NSW) does not deem intentional overcharging to be professional misconduct. Section 498(1)(b) of the 2004 Act provides that charging of excessive legal costs in connection with the practise of law is capable of being professional misconduct or unsatisfactory professional conduct. This obviously captures a wide range of excessive costs practices, and whether the act of charging clients in the same proceedings without apportionment constitutes professional misconduct or unsatisfactory professional conduct will depend very much on the circumstances of the case.

The decision of the Court of Appeal does make clear that to charge clients in the same proceedings more than once for the same work is excessive, and most likely deliberate. Following this decision, the practice of charging multiple clients without apportionment is likely to attract disciplinary consequences.

By Catherine Gleeson

Endnotes

1. *Law Society of NSW v Andrew Brian Fegent* (unreported, judgment delivered on 24 April 1989); *Veghelyi v The Law Society of New South Wales* (unreported, Court of Appeal , 6 October 1995).
2. Ms Bechara raised 16 grounds of appeal, many of which related to the conduct of the complaint and the proceedings before the Tribunal, and the penalty imposed by the Tribunal. This note focuses on the grounds going to liability.
3. *Oppenshaw v Whitehead; Mucklow v Whitehead* (1854) 9 EX 384; *Tucker v Graham* (1869) 8 SCR (NSW) 341; *In re Metropolitan Coal Consumers' Association (Grieb's Case)* (1890) 45 Ch D 606; *International Financial Society v Smith* (1896) 22 VLR 114; *Price v Clinton* [1906] 2 Ch 487; *Carter v Newcastle Wallsend Coal Co* (1909) 9 SR (NSW) 474; *Boguslawski v Gdynia Ameryka Linie (No. 2)* [1951] 2 KB 328; *R v Hore; Ex parte Brisbane City Council* [1969] Qd R 75; *Meade v Queensland Ambulance Service* [1996] QSC 62; *Pester; Leslie v Hydro-Electric Corporation* (1997) 7 Tas R 233.